

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ERIC and DEBORAH EBERTS,

Plaintiff,

v.

Case No. 05-C-527

TORGE GODERSTAD, et al.,

Defendants.

ORDER

American Family Insurance has moved for a stay of all action in this case pending the appeal of my decision finding that it has no duty to continue providing a defense. It asserts that any benefit it obtained by its success on the coverage question will be undermined if this case can proceed while it picks up the defense bill pending the appeal. Both parties oppose its motion.

At least two reasons support denial of American Family's motion. First, it has provided a defense under a reservation of rights, and I see no reason it cannot craft a means to recover any costs it incurs in continuing to provide a defense. Thus, I reject its argument that its success on the coverage question would essentially be undermined if a stay is not granted. Second, because it was successful on the coverage question it is doubtful that it could be subjected to a bad faith claim in the event it decides to stop providing a defense at this point. An insurer commits the tort of bad faith only when it denies "a claim without a reasonable basis for doing so, that is, when the claim is not fairly debatable." *Mowry v. Badger State Mut. Cas. Co.*, 385 N.W.2d 171, 180 (1986). Given the fact that a court has now determined it has no duty to provide a defense, an insured would

presumably be hard-pressed to assert that American Family acted in bad faith by failing to provide a defense to the appeal.

Given these considerations, there seems little reason to continue to delay reaching the merits of the case. Insurers have many options available to them when they contest coverage, but among the least palatable of these is the assertion of a right to halt all proceedings while the coverage question is determined not just by the trial court but by the court of appeals as well. The motion to stay is therefore DENIED.

SO ORDERED this 13th day of October, 2006.

s/ William C. Griesbach
William C. Griesbach
United States District Judge